NO. 21564

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMMET WALTER WENDT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S MOTION FOR REHEARING

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

BARRY TARLOW
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Attorney for Appellant.

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I

JURISDICTIONAL STATEMENT

On May 9, 1968, this Court affirmed the judgment of the trial court in the above-entitled case. Appellant is now moving for a rehearing in this matter.

II

STATEMENT OF FACTS

During the questioning of an agent of the Federal Bureau of Investigation by the Government prosecutor a conversation with appellant was introduced in which appellant refused to discuss the case based on the advice of his attorney. (R. T. pp. 660-661) 1/

This testimony was admitted without objection.

1/ R. T. refers to Reporter's Transcript of Court Proceedings.

It is possible that the Government prosecutor in his closing argument commented on appellant's refusal to speak with the FBI agent. (See Affidavit of Barry Tarlow in Support of Motion for Extension of Time in Which to File Motion for Rehearing.) The closing argument by the Assistant United States Attorney was not even prepared as part of the record of this appeal. (R.T. p. 1607).

Appellant's trial attorney, who also represented him on appeal, did not raise any issue on appeal concerning the use by the Government of appellant's refusal to discuss the case with an FBI agent.

III

ARGUMENT

A. IT IS REVERSIBLE ERROR FOR THE GOVERNMENT TO PRESENT TESTIMONY THAT APPELLANT EXERCISED HIS RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS.

The record reveals that there are approximately 33 lines of testimony concerning appellant's reluctance to discuss the case. (R.T. pp. 660-661).

The jury in this case was informed that appellant had "said that his attorney had told him that he shouldn't discuss the matter further unless his attorney was present," (R.T. p. 660, l. 14-16) and that "he felt obliged to follow his attorney's advice." (R.T. pp. 660-661).

The only purpose of this testimony is to create in the minds of the jury the impression that appellant is guilty or has something to hide and therefore his attorney has advised him to remain silent.

In Baker v. United States, 357 Fed. 2d 11 (5th Cir. 1966) the Court reversed a judgment in a similar case.

> "In asking for counsel before making any statement appellant was exercising a constitutional right which the Supreme Court has time and again declared to be guaranteed to all persons accused of crime. To have proven that appellant requested the right of counsel and thereafter made no further statement was we feel as objectionable as it would have been to comment on defendant's exercising his constitutional right not to take the witness stand." Baker, supra, at p. 13.

In Fagundes v. United States, 340 Fed. 2d 673 (1st Cir. 1965) the Court stated that:

> "His assertion of one constitutional right, his right to counsel, and his reliance upon another constitutional right, his right to remain silent when charged with crime, we think cannot be used against him substantively as an admission of guilt, for to do so would be to render the constitutional rights mere empty formalities devoid of practical substance....
>
> "...we think it reversible error to permit a jury to draw any inference adverse to one accused of crime from his reliance upon his constitutional right to silence and to the advice of counsel." Fagundes, supra, p. 677.

B. THIS CASE INVOLVES PLAIN ERROR UNDER RULE 52(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND OBJECTION AT THE TRIAL LEVEL WAS UNNECESSARY.

It is obvious that this error is plainly prejudicial. See State v. Smith, 420 P. 2d 278 (Supreme Court of Arizona). It must be remembered that appellant's defense in this case was that he was a law-abiding businessman and was not involved in any criminal conduct. The question which would then be asked by any juror would be, would an honest businessman refuse to talk to an FBI agent on the advice of his attorney? The answer, at least to a layman, would certainly be no, he would not.

C. IF APPELLANT'S TRIAL AND APPELLATE COUNSEL IS DEEMED TO HAVE WAIVED APPELLANT'S CONSTITUTIONAL OBJECTIONS TO THE EVIDENCE IN QUESTION, THE APPELLANT MAY NOT BE BOUND BY THE WAIVER SINCE HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Both at the trial level and on appeal appellant's attorney has a duty to familiarize himself with the law of the case. If substantial error is involved in this case the fact that it was not brought to the attention of the Court either at the trial level or on appeal it is strong evidence that appellant has been denied the effective assistance of counsel. Stem v. Turner, 370 Fed. 2d 895, 900 (4th Cir. 1966). In Coles v. Peyton, 389 Fed. 2d 224, 226, (4th Cir. 1968) the Court held that "counsel must conduct appropriate investigations both factual and legal." It seems that at the trial

level counsel was not aware of the legal problem involved in this motion for rehearing. Whatever justifications can be advanced for his conduct at the trial level, he certainly should have discovered this problem if "appropriate legal investigation" had been made prior to the hearing of this appeal.

IV

CONCLUSION

For the reasons stated above a rehearing should be granted in this matter.

Respectfully submitted,

BARRY TARLOW

Attorney for Appellant

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and, that in my opinion, the foregoing brief is in full compliance with those rules. I further certify that in my judgment this Appellant's Motion for rehearing is well founded and that it is not interposed for delay.

/s/ Barry Tarlow
BARRY TARLOW